IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and JILL MEADOWS. M.D., Petitioners, v. TERRY E. BRANSTAD and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE081503 **MOTION TO DISMISS**

COME NOW Respondents Terry E. Branstad and Iowa Board of Medicine and in support of their motion to dismiss this action pursuant to Iowa Rules of Civil Procedure 1.421(1)(a) and (f) state as follows:

SOVEREIGN IMMUNITY

The State of Iowa is cloaked with immunity from suit in its courts. *See Chance v. Temple*, 1 Clarke 179, 201 (Iowa 1855). Absent a waiver of immunity, this court lacks jurisdiction to resolve a dispute between Petitioners and the State. *See Lee v. State, Polk County Clerk of Court*¸ 815 N.W.2d 731, 737 (Iowa 2012). Petitioners cannot avoid this immunity by naming Respondent Branstad in his official capacity as the Governor of Iowa. Such actions are, in effect, against the State:

> While a suit against state officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against a state officer or a state board, commission, or department in his or its official capacity when the real claim is against the state itself, and the state is the party vitally interested. If the rights of the state would be directly and adversely affected by the

> judgment or decree sought, the state is a necessary party defendant, and if * * * it has not consented to be sued, the suit is not maintainable.

Meghee v. Barnes, 160 N.W.2d 815, 819 (Iowa 1968) overruled on other grounds by *Kersten Co., Inc. v. Dept. of Social Services*¸ 207 N.W.2d 117 (Iowa 1973) (quoting 49 Am. Jur. *States, Territories, and Dependencies*, § 92 at 304). Beyond signing the bill into law, the only connection Petitioners allege between Respondent Branstad and the challenged statute is the general duty of the Governor of Iowa to "take care that the laws are faithfully executed." Iowa Const. Art. 4, § 9. It is clear that Respondent Branstad is a placeholder for the State in this action.

Likewise, Respondent Iowa Board of Medicine. Respondent Iowa Board of Medicine is the agency responsible for examination, licensing, and discipline of physicians practicing in Iowa. *See* Iowa Code Chs. 147, 148. Senate File 471 directs Respondent Iowa Board of Medicine to adopt rules pursuant to chapter 17A to administer the statute. Senate File 471 to be codified at Iowa Code § 146A.1(5). The statute also states that a physician who violates its requirements is subject to licensee discipline under Iowa Code section 148.6. Senate File 471 to be codified at Iowa Code § 146A.1(3). Any acts or omissions by Respondent Iowa Board of Medicine in carrying out these and other official duties constitute "agency action" within the scope of the Iowa Administrative Procedure Act. Iowa Code § 17A.2(2). The State has provided a mechanism for review of agency action by statute. *See* Iowa Code § 17A.19. A petition for judicial review is the exclusive means to obtain review of agency action in a court of law. Iowa Code § 17A.19. Outside the context of judicial review under chapter 17A, a waiver of or

exception to sovereign immunity is necessary. Petitioners have not so pled, and this action cannot be maintained.

PETITIONERS' STANDING

Even if this action did not violate the State's sovereign immunity, a party petitioning the courts must have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). There are two threshold requirements for standing: (1) a party must have a specific personal or legal interest in the litigation, and (2) they must be injuriously affected. *Id.*; *see also Alons v. Iowa Dist. Court for Woodbury County*¸ 698 N.W.2d 858, 864 (Iowa 2005). The Iowa Supreme Court has also cited with approval the standing requirements announced in federal courts under article III of the United States Constitution. *Alons*, 698 N.W.2d at 867-68; *see also Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005). Notably, the federal test requires a "causal connection" between the injury and the challenged conduct. *Alons*, 698 N.W.2d at 868 (quoting *Lujan v. Defenders of Wildlife*¸ 504 U.S. 555, 560-61 (1992)). In other words, the injury must be "fairly traceable" to the conduct of the defendant. *Id.* Moreover, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted).

Petitioner Planned Parenthood of the Heartland, Inc.

Petitioner Planned Parenthood of the Heartland lacks standing to challenge new Iowa Senate File 471, to be codified at Iowa Code section 146A.1. The new law requires "[a] physician performing an abortion" to obtain written certification from the pregnant woman of the following:

> a. That the woman has undergone an ultrasound imaging of the unborn child that displays the approximate age of the unborn child.
>
> b. That the woman was given the opportunity to see the unborn child by viewing the ultrasound image of the unborn child.
>
> c. That the woman was given the option of hearing a description of the unborn child based on the ultrasound image and hearing the heartbeat of the unborn child.
>
> d. (1) That the woman has been provided information regarding all of the following, based upon the materials developed by the department of public health pursuant to subparagraph (2):
>
> (a) The options relative to a pregnancy, including continuing the pregnancy to term and retaining parental rights following the child's birth, continuing the pregnancy to term and placing the child for adoption, and terminating the pregnancy.
>
> (b) The indicators, contra-indicators, and risk factors including any physical, psychological, or situational factors related to the abortion in light of the woman's medical history and medical condition.

Iowa Senate File 471 (to be codified at Iowa Code §§ 146A.1(a)-(d)(1)). Petitioner Planned Parenthood of the Heartland is neither "a physician performing an abortion," nor is it a "pregnant woman." As such, it seeks to assert the rights of its "staff" and its "patients." In a typical case, a party "may not assert the rights of third persons." *Iowa Movers and Warehousmen's Ass'n v. Briggs*, 237 N.W.2d 759, 772 (Iowa 1976); *accord Godfrey v. State*¸ 752 N.W.2d 413, 424 (Iowa 2008).

The Respondents recognize that a plurality of the United States Supreme Court has recognized "that it is generally appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."

Singleton v. Wulff, 428 U.S. 106, 117-18 (1976). That said, key to the Court's decision in *Singleton* were two factors: (1) the "doctor-patient" relationship, with its attendant intimacy and confidentiality, and (2) obstacles to a woman's assertion of her own rights. Unlike Petitioner Meadows, Petitioner Planned Parenthood of the Heartland, Inc. does not have a "doctor-patient" relationship with women seeking abortions. Moreover, Justice Powell's partial dissent in *Singleton* addressed the alleged "obstacles" as follows:

> The plurality virtually concedes, as it must, that the two alleged "obstacles" to the women's assertion of their rights are chimerical. Our docket regularly contains cases in which women, using pseudonyms, challenge statutes that allegedly infringe their right to exercise the abortion decision. Nor is there basis for the "obstacle" of incipient mootness when the plurality itself quotes from the portion of *Roe v. Wade*, 410 U.S. 113, 124-125 (1973), that shows no such obstacle exists. In short, in light of experience which we share regularly in reviewing appeals and petitions for certiorari, the "obstacles" identified by the plurality as justifying departure from the general rule simply are not significant.

Id. at 126-27. Under these circumstances, Petitioner Planned Parenthood of the Heartland cannot assert the rights of women seeking abortions. Because the challenged statute does not regulate Petitioner Planned Parenthood of the Heartland, it should be dismissed as a petitioner.

Petitioner Jill Meadows

Petitioner Meadows is a physician who performs abortion in Iowa. (Petition ¶ 8). She asserts her own rights as well as those of her abortion patients. (Petition ¶ 8). Petitioner Meadows alleges that the new law violates her right to due process because it is vague. (Petition ¶ 61). She also alleges that the law violates her patients' right to substantive due process (Petition ¶ 57) and to the equal protection of the laws. (Petition ¶

59). As explained above, that a plurality of the United States Supreme Court has recognized that it is generally appropriate to allow a physician to assert the substantive due process right to an abortion on behalf of her patients. While this court is free to reach a different conclusion under Iowa law, Respondents do not challenge Petitioner Meadows's standing on that basis. Respondents also recognize that Petitioner Meadows has standing to assert her own rights as a physician who performs abortions. With that said, several comments on Petitioner Meadows's standing are appropriate.

First, while Iowa law recognizes exceptions to the rule against third-party standing in some contexts, it does not do so for equal protection claims. *See Iowa Movers*, 237 N.W.2d at 773 ("This court has held in a number of cases that only a member of the class subjected to discrimination may raise an equal protection claim") (citing cases). Petitioner Meadows alleges that the new law discriminates against women by singling out abortion for regulation. (Petition ¶ 59). While Petitioner Meadows is a member of the class allegedly subjected to discrimination, she does not allege that she is seeking an abortion or is in any other way personally injured by the alleged discrimination. It is clear that she is attempting to assert third-party rights.

FAILURE TO STATE A CLAIM

A motion to dismiss can be granted when the petitioners fail to state a claim upon which any relief can be granted. Iowa R. Civ. P. 1.421(1)(f); *Meyn v. State*, 594 N.W.2d 31, 33 (Iowa 1999). Allegations in the petition are reviewed in the light most favorable to the pleader. *Id.* In this case, Petitioners challenge the constitutionality of Senate File 471 on its face. "A party making a facial challenge bears a heavy burden, as it must demonstrate the statute is incapable of any valid application." *State v. Hernandez-Lopez*,

639 N.W.2d 226, 237 (Iowa 2002). "In short, the challenger must show no conceivable set of circumstances exist under which the statute would be valid." *Id.* Petitioners seek declaratory and injunctive relief on the grounds that Senate File 471 is unconstitutionally vague, that it violates the equal protection clause of the Iowa Constitution, and that it infringes on Petitioners' patients' substantive due process right to an abortion. Because Petitioners have failed to plead adequate facts to meet their "heavy burden" under a facial challenge, dismissal under Rule 1.421 is appropriate.

Vagueness

The Petition alleges that Senate File 471 fails to provide "fair notice" to abortion providers of the conduct required of them under the statute, and fails to provide sufficient guidance to the Board of Medicine to prevent arbitrary and discriminatory enforcement of its provisions. In the past, the Iowa Supreme Court has employed an "avoidance theory" in the context of due process challenges to statutes. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). When considering a vagueness challenge, the court "presumes the statute is constitutional and gives *any* reasonable construction to uphold it." *Id*. (quotations omitted) (emphasis in original). "Conversely states, challengers to a statute must refute *every* reasonable basis upon which a statute might be upheld." *Id.* at 540 (quotations omitted) (emphasis in original). Finally, vagueness challenges are not determined based on the "subjective expectations" of the party bringing the challenge. *Id.*

Subsection (1)(d)(1) of Senate File 471 provides guidance to the abortion provider regarding what must be provided to the woman prior to the procedure. Petitioners allege that they already provide information to women prior to the procedure that includes "all material risks involved in the procedure." (Petition ¶¶ 19-21). Senate File 471 insulates

abortion providers by allowing them to meet the statutory requirement using materials provided by the Iowa Department of Public Health, available at https://idph.iowa.gov/pregnancy-options/information-for-providers. Other courts have examined similar language and found no vagueness problem. *See Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*¸ 185 S.W.3d 685, 689-91 (Mo. 2006).

The Petition sets forth no facts supporting the allegation that the law provides insufficient guidance to the Board of Medicine. While Respondents recognize that the standard on a motion to dismiss favors the pleader, they cannot be left to guess at the basis for Petitioners' claim. *See Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (pointing out that while we still have notice pleading in Iowa, a petition still must contain "factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition.").

Equal Protection

The Petition alleges that Senate File 471 deprives Petitioners and their patients of the equal protection of the laws for two reasons: First, because the legislature "singl[ed] out" abortion among medical procedures for the informed-decisionmaking provision, and second, by "discriminating against women on the basis of their sex and on the basis of gender stereotypes." (Petition ¶ 59). As to the former, the rational basis test applies and the claim can be resolved on a motion to dismiss. *See King v. State*, 818 N.W.2d 1, 28 (Iowa 2012). As to the latter, Petitioners have failed to plead disparate treatment on the basis of sex. *Id.* at 24-25.

Senate File 471 regulates only physicians who provide abortions. Physicians who provide abortions are not a suspect class as compared to other physicians. Moreover, while a pregnant woman has a right to access an abortion, courts have not recognized a right of a physician to perform one. "Unless a suspect class or a fundamental right is at issue, equal protection claims are reviewed under the rational basis test." *Id*. at 25. Under Iowa law, the rational basis for a statute need only be "*realistically* conceivable" and have a "basis in fact." *Id.* at 30 (quoting *Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 15-16 (Iowa 2004)). Because the legislature could conclude that abortion is unique among medical procedures, a statute that treats abortion differently bears a rational connection to the State's "legitimate interest in protecting the potential life of the fetus." *See Harris v. McRae*, 448 U.S. 297, 324 (1980).

As the Iowa Supreme Court held in *King*, "any equal protection claim … requires an allegation of disparate treatment, not merely disparate impact." *Id.*at 24. The Petition in this case does not allege disparate treatment of women by the Iowa legislature. The allegations in the Petition concerning the discrimination on the basis of sex and "gender stereotypes" are allegations about the impact of the law. The Petition alleges that the law "suggests" to women that the legislature believes them less capable of decisionmaking, or that it "reflects" discriminatory stereotypes. (Petition ¶ 51). The Petition does not allege that the legislature *intended* to discriminate on these bases, and the law itself does not do so on its face. Because Petitioners have not alleged disparate *treatment* on the basis of sex, they cannot proceed with heightened scrutiny on their equal protection claim.

Substantive Due Process

The Petition focuses on the alleged harm to women seeking abortions caused by a 72-hour delay. Even if true, the allegations in the Petition do not show a deprivation of a substantive due process right to an abortion caused by the Respondents. Petitioners claim that they only schedule abortion patients one or two days per week, and that they already schedule patients "weeks out." (Petition ¶ 38). Because the law does not require that the same physician provide the abortion and the required information, it is unclear from the Petition why a woman would not be able to provide the certification 72 hours prior to an abortion scheduled "weeks out." As a result, it is unclear why the new law must cause *any* additional delay for Petitioners' patients. As explained above, "a party making a facial challenge bears a heavy burden, as it must demonstrate the statute is incapable of any valid application." *Hernandez-Lopez*, 639 N.W.2d at 237. Because Petitioners have failed to meet this heavy burden, even assuming the truth of all of their allegations, dismissal is appropriate.

FAILURE TO STATE A CLAIM AGAINST

RESPONDENT BRANSTAD

Respondent Terry E. Branstad is named in this action in his official capacity as the Governor of Iowa. (Petition at ¶ 9). Beyond signing the bill into law and the "take care" clause, Petitioners have not alleged any act or omission of Respondent Branstad giving rise to this action. With respect to the signing of the bill, the doctrine of legislative immunity protects Respondent Branstad when he signs legislation just as it protects individual legislators. *See Lajoie v. Connecticut State Bd. of Labor Relations*, 837 F. Supp. 34, 40 (D. Conn. 1993) (citing *Tenny v. Brandhove*, 341 U.S. 367 (1951)).

Courts across the country have consistently held that a governor's general duty under a "take care" clause does not give rise to a cause of action absent facts that establish a specific duty to enforce or an actual connection to the enforcement of the law. *See, e.g., Waste Management Holdings, Inc. v. Gilmore*¸ 252 F.3d 316, 331 (4th Cir. 2001); *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir. 1979); *King v. Louisiana ex rel. Jindal*, No. 13-4913, 2013 WL 5673584 at *2 (E.D. La. Oct. 16, 2013); *LensCrafters, Inc. v. Sundquist*, 184 F. Supp. 2d 753, 758 (M.D. Tenn. 2002); *Warden v. Pataki*, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999) *aff'd Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). As one court put it, "[g]eneral authority to enforce the law of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *1st Westco Corp v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993). The Petition contains no allegation connecting Respondent Branstad to the implementation or enforcement of Senate File 471. As a result, Petitioners have failed to state a claim against Respondent Branstad and he must be dismissed from this action.

WHEREFORE, Respondent-Appellees respectfully request that the Petition for Declaratory and Injunctive Relief be dismissed in its entirety.

Respectfully submitted,

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